Tropical Profile Sdn Bhd v Kerajaan Malaysia, Jabatan Kerja Raya Malaysia & Ors

HIGH COURT (MELAKA) — ORIGINATING SUMMONS NO MT1–24–357 OF 2005
LOW HOP BING J
24 DECEMBER 2007

Civil Procedure — Declaration — Application for — Entitlement to retention sum held by first defendant — Pending action of main prayers — Whether application premature

The plaintiff applied for, inter alia, a declaration that the plaintiff was entitled to the retention sum of RM4,558,617.37 ('the retention sum') in the account of the first defendant ie Jabatan Kerja Raya ('Public Works Department') pursuant to a particular project ('encl (34)'). At the material time, 98% of the project had been completed, for which relevant payments had been made by the first defendant to the sixth defendant and the sixth defendant had in turn made payments to the second defendant. However, the second defendant failed to make payments to the plaintiff and therefore the plaintiff commenced a civil action against the second defendant to recover the said payments (Melaka civil action). The plaintiff relied on, inter alia, the doctrine of trust and estoppel. The first defendant argued, inter alia, that the retention sum was needed to make payment towards the costs of repairs in the project, amounting to RM4,049,914 and that the declaration sought by the plaintiff was not suitable, having regard to the facts of this case. It was submitted by the second, third, fourth and sixth defendants that the plaintiff's action was an abuse of the process of the court as there was another suit ie the Melaka civil action against the second defendant. On 29 March 2007, in relation to encl (34), the court made, inter alia, an interim order that the retention sum should continue to be held in the account of the first defendant pending the hearing and disposal of encl (34).

Held:

At this stage of the proceedings, it was eminently premature to grant the declaration in relation to the retention sum. The facts of the case required the retention sum to be held by the first defendant in view of the plaintiff's originating summons in encl (34) and the Melaka civil action which must be brought to their logical conclusion. Thus, the interim order was extended

until the final disposal of the plaintiff's main prayers in encl (34) and the Melaka civil action (see paras 16–17).

[Bahasa Malaysia summary

Plaintif memohon, antara lain, untuk satu deklarasi bahawa plaintif berhak kepada jumlah penahanan RM4,558,617.37 ('jumlah penahanan tersebut') dalam akaun defendan pertama iaitu Jabatan Kerja Raya berikutan sebuah projek ('lampiran (34)'). Pada masa yang material, 98% bahagian projek tersebut telahpun disiapkan, di mana bayaran-bayaran relevan telah dibuat oleh defendan pertama kepada defendan keenam dan defendan keenam telah membuat bayaran-bayaran tersebut kepada defendan kedua. Walau bagaimanapun, defendan kedua gagal membuat bayaran kepada plaintif dan oleh itu, plaintif telah memulakan satu tindakan sivil terhadap defendan kedua untuk mendapatkan bayaran-bayaran tersebut (tindakan sivil Melaka). Plaintif bergantung, antara lain, kepada doktrin amanah dan estopel. Defendan pertama mempertikaikan, antara lain, bahawa jumlah penahanan tersebut dikehendaki untuk membuat bayaran terhadap kos-kos pembaikan projek tersebut, yang berjumlah RM4,049,914 dan deklarasi yang dituntut plaintif adalah tidak sesuai, setelah mengambilkira fakta-fakta kes ini. Ia dihujahkan oleh defendan-defendan kedua, ketiga, keempat dan keenam bahawa tindakan plaintif adalah satu penyalahgunaan proses mahkamah oleh kerana terdapat satu lagi tindakan iaitu tindakan sivil Melaka terhadap defendan kedua. Pada 29 Mac 2007, berhubungan dengan lampiran (34), mahkamah telah, antara lain, membuat satu perintah interim untuk jumlah penahanan diteruskan dipegang dalam akaun defendan pertama sementara menunggu pendengaran dan penyelesaian lampiran (34).

Diputuskan:

Pada peringkat prosiding ini, ia adalah dengan jelas pra-masa untuk memberikan deklarasi berhubungan dengan jumlah penahanan tersebut. Fakta-fakta kes ini memerlukan jumlah penahanan tersebut dipegang oleh defendan pertama memandangkan saman pemula plaintif dalam lampiran (34) dan tindakan sivil Melaka yang harus dibawa kepada satu penyelesaian. Oleh itu, perintah interim tersebut dilanjutkan sehingga pemutusan muktamad permohonan utama plaintif dalam lampiran (34) dan tindakan sivil Melaka (lihat perenggan 16–17).]

Notes

For cases on application for declaration, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2303–2329.

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1)(d)

Patricia Lau Ee Ling (EL Lau & Associates) for the plaintiff
Zaliha binti Mohd Janis (Senior Federal Counsel) for the first defendant.
Hidayat (Faisyal Grewal & Co) for the second to sixth defendants.

Low Hop Bing J (now JCA):

APPLICATION

[1] This is the plaintiff's application by way of amended originating summons in encl (34) seeking, inter alia, a declaration that the plaintiff is entitled to the retention sum of RM4,558,617.37 ('the retention sum') in the account of the first defendant ie, Jabatan Kerja Raya ('Public Works Department') pursuant to the project known as 'Cadangan Membina Jalan Raya Durian Tunggal-Paya Rumput Sungai Udang Melaka' ('the Project'), or such other order as the court deems fit; and costs.

FACTUAL BACKGROUND

[2] On 29 March 2007, in relation to encl (34), I made, inter alia, an interim order that the retention sum shall continue to be held in the account of the first defendant pending the hearing and disposal of encl (34).

[3] The salient factual background shows that on 8 August 2001, the first defendant awarded the project to the sixth defendant at a consideration of RM205m. The sixth defendant is an unincorporated joint venture body formed by the second to the fifth defendants.

[4] On or about 24 October 2001, the sixth defendant appointed the second defendant as subcontractor to carry out part of the project. The second defendant and the plaintiff then entered into two agreements viz:

(1) agreement dated 15 November 2001 for technical services at a consideration of RM53,574,414.50; and

(2) letter of acceptance of tender dated 17 March 2003 for contract works at a consideration of RM7,461,567.30.

[5] The payments for the above considerations are said to be 'back to back' ie, from the first defendant to the sixth defendant to the second defendant and finally to the plaintiff.

[6] Pursuant to the above agreements, the plaintiff had from time to time made claims for and received payments from the second defendant. Pursuant to the letter dated 8 June 2004, the second defendant has agreed and admitted to the arrears that ought to be paid to the plaintiff.

[7] At the material time, 98% of the project had been completed, for which relevant payments had been made by the first defendant to the sixth defendant and the sixth defendant had in turn made payments to the second defendant. Although the second defendant was to make payments to the plaintiff, it had failed, refused and/or neglected to do so.

[8] On or about 14 October 2004, the plaintiff commenced Kuala Lumpur High Court civil action No S1–22–1570 of 2004 ('KL civil action') against the second defendant to recover the said payments. The KL civil action had since been transferred to the Melaka High Court and registered as MT2–22–114 of 2006 ('Melaka civil action').

[9] The second defendant does not have any other development project or asset within the jurisdiction of this court.

[10] Vide letter dated 6 December 2004, the first defendant intervened and invited the plaintiff to attend a meeting on 14 February 2004. At the meeting, the first defendant's director of project management and coordination ('group IV') announced that payments for the project which ought to be made, inter alia, to the plaintiff in the project shall be paid by the first defendant direct to the plaintiff.

[11] The plaintiff also averred that the first defendant was estopped from making payments, inter alia, to the second defendant, and the balance thereof should be held by the first defendant on trust for the benefit of the plaintiff.

RETENTION SUM

[12] Plaintiff's learned counsel relied on, inter alia, the doctrine of trust and estoppel.

[13] On the other hand, learned senior federal counsel argued, inter alia, that the retention sum was needed to make payment towards the costs of repairs in the project, amounting to RM4,049,914 and that the declaration sought by the plaintiff is not suitable, having regard to the facts of this case.

A **[14]** It was submitted by learned counsel for the second, third, fourth and sixth defendants that the plaintiff's action is an abuse of the process of the court as there was another suit, ie the Melaka civil action against the second defendant.

B **[15]** First, I shall deal with the issue of abuse of the process of the court raised for the second, third, fourth and sixth defendants. This issue is identical to that raised for the first defendant by way of a formal application in encl 40. I have dealt with this issue on 29 March 2007 when I held that it was not an abuse of the process of the court and so it was outside the ambit C of O 18 r 19(1)(d) of the Rules of the High Court 1980.

[16] Reverting to the plaintiff's prayer for declaration, I am of the view that at this stage of the proceedings, it is eminently premature to grant the declaration in relation to the retention sum. It is more appropriate to deal D with the alternative prayer sought in encl (34). The facts of the case require the retention sum to be held by the first defendant in view of the plaintiff's main prayers in the amended originating summons in encl (34) and the Melaka civil action which must be brought to their logical conclusion. That makes it necessary for me to extend the abovesaid interim order. E

CONCLUSION

[17] On the foregoing grounds, I hereby extend the interim order for the F retention sum to be held in the account of the first defendant until the final disposal of the plaintiff's main prayers in the amended originating summons in encl (34) and the Melaka civil action. Costs in the cause.

Order accordingly.

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Reported by Sally Kee

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